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No. 90-1630

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In the Supreme Court of the United States

OCTOBER TERM, 1990

ON LEONG CHINESE MERCHANTS ASSOCIATION BUILDING, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1955(d), which provides for the forfeiture of "any property, including money" used in violation of Section 1955, authorizes the forfeiture of real property.

2. Whether the district court abused its discretion in denying petitioner's motion for a continuance of summary judgment proceedings under Federal Rule of Civil Procedure 56(f).

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v.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 918 F.2d 1289. The opinion of the district court granting the government's motion for summary judgment (App., *infra*, 1a-4a), and its order denying petitioner's motion for a continuance (App., *infra*, 5a-7a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1990. On February 7, 1991, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including April 15, 1991, and the petition was filed on that date. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1988, the United States brought a federal court action seeking forfeiture of petitioner, the On Leong Chinese Merchants Association Building located in Chicago, Illinois. The complaint alleged that the building had been used for an illegal gambling operation, in violation of 18 U.S.C. 1955. The complaint also sought forfeiture of $323,427.96 in cash, cashiers checks totalling $2,500, gambling chips and other gambling paraphernalia, and video equipment. Pet. App. 4a.

The affidavit of FBI Special Agent James Whitmer, which was attached to the complaint, detailed the grounds for forfeiture. On September 2, 1984, Chicago police officers entered the building with a warrant and found several persons playing the gambling game of Fan-Tan on the second floor. The officers arrested 16 persons and confiscated gambling equipment and cash. Five months later, on February 22, 1985, police officers again raided the building. On this occasion, the officers arrested 11 persons who were playing Fan-Tan on the second floor, and seized gambling equipment, chips, and cash. One year later, police officers returned to the building and discovered a gambling operation in the building's basement. On that occasion in March 1986, the officers arrested 18 persons and seized Fan-Tan gambling equipment, gambling chips, and cash. Pet. App. 2a.

The government learned more about the continued gambling operations in the building as a result of a visit by an undercover FBI agent. On April 19, 1988, the agent entered the second floor of the building through a door equipped with closed circuit television

and an electronic buzzer. He saw at least 50 persons playing Fan-Tan and another game, Pai-Gow, for stakes as high as $4,000; he counted at least six persons working at the gambling tables. The agent purchased $500 in chips and placed bets. When the agent won, he received 90% of his winnings; the house kept the remaining 10%. Pet. App. 3a.

On the following evening, FBI agents executed a warrant to search the building. When they entered the building, over 100 persons were gambling. The agents seized more than $300,000 in cash, gambling chips worth $75,000, video equipment, and gambling paraphernalia. During this raid, the agents saw three corporate officers of the On Leong Chinese Merchants Association present in the gambling room. Pet. App. 3a-4a.

2. In response to the government's action, the On Leong Chinese Merchants Association filed a claim to the building and initiated discovery proceedings.[1] The government later successfully moved to stay discovery pending completion of an ongoing criminal investigation. In September 1988, the government—based on the information outlined above—filed a motion for summary judgment with respect to forfeiture of the building and other seized property. Petitioner then filed a motion for a continuance of summary judgment proceedings under Federal Rule of Civil Procedure 56(f). Pet. App. 4a.[2]

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[1] We will refer to the Association and the building collectively as petitioner.

[2] Fed. R. Civ. P. 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judg-

In May, 1989, the district court denied petitioner's motion to stay proceedings related to the building. Pet. App. 4a; App., *infra*, 5a-7a.[3] The court found that

> the affidavits presented by the government * * * are replete with detail concerning the circumstances which the government argues constitute probable cause. [Petitioner] has identified no specific testimony that it hopes to gain from deposing the affiants; it rests on general arguments that it may be able to establish information concerning the "basis, scope and accuracy of their observations" which would make the affidavits less credible.

Id. at 6a-7a. "In light of the detail already presented in the affidavits," the court concluded, petitioner's request for additional discovery was unwarranted. *Id.* at 7a. (citing *DF Activities Corp* v. *Brown*, 851 F.2d 920 (7th Cir. 1988)). Moreover, the court held that petitioner's alleged inability to obtain information from its own witnesses because of the pending criminal investigation was not "a valid basis for interrupting the civil action." App., *infra*, 7a. In the court's view, petitioner's position amounted to an argument that "it possesses the relevant information but is unwilling or unable to submit it." *Ibid.*

3. In October 1989, the district court granted the government's motion for summary judgment and ordered the building forfeited. App., *infra*, 1a-4a. The

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ment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[3] The government agreed with petitioner to stay summary judgment proceedings with respect to the other seized property. Pet. App. 4a.

court first rejected petitioner's contention that 18 U.S.C. 1955(d), which allows for the forfeiture of "any property" used in violation of Section 1955, did not authorize the forfeiture of real property. App., *infra*, 2a (citing cases).[4] The court next held that the government had established probable cause to believe that the building was being used for illegal gambling in violation of Section 1955. In particular, the court determined that the government had shown that the building was used as "an illegal gambling business" within the meaning of Section 1955(b)(1), *i.e.*, "that the business have a gross revenue of $2000 in a single day." App., *infra*, 3a. The court pointed to the government's uncontroverted submission that the undercover FBI agent "witnessed six bettors at one table placing wagers of as much as $3000 to $4000, and 25 to 30 bettors at another table placing wagers of as much as $1500 to $2000." *Ibid.*[5]

4. The court of appeals affirmed. Pet. App. 1a-23a. It rejected petitioner's contention that the district court had improperly denied the motion for a continuance under Fed. R. Civ P. 56(f). The court of appeals found that petitioner

> failed to specify any information it could produce by deposing either adverse witnesses or witnesses under its control. Similarly [petitioner] did not demonstrate that it would discover facts

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[4] Section 1955(d) provides in pertinent part:

> Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States.

[5] The court of appeals upheld the district court's probable cause determination, Pet. App. 5a-10a, and petitioner has not sought further review of that issue.

> sufficient to rebut the government's showing of probable cause.

Pet. App. 12a. "Under these circumstances," the court held, "the district court did not abuse its discretion in refusing [petitioner's] Rule 56(f) motion." *Ibid.*

The court also rejected petitioner's contention that Section 1955(d) does not authorize the forfeiture of real property. The court determined that the language of the statute—"[a]ny property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States" (18 U.S.C. 1955(d))—is "unambiguous." Pet. App. 16a. Moreover, the court reviewed the pertinent legislative history and concluded that it "furnishes no reason to depart from the plain meaning of the statutory language." *Id.* at 17a. Finally, the court pointed out that the "purpose of 18 U.S.C. § 1955(d) is best served by allowing the forfeiture of real estate as well as personal property." Pet. App. 19a.[6]

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[6] Judge Cudahy filed a concurring opinion. In his view,

> [s]eizure of the On Leong building may not be disproportionate to the gambling offense here. It is, however, a three-story landmark structure with an unusual cultural history and substantial economic value. A forfeiture of this genre and magnitude may be authorized and appropriate, but it seems * * * to mark a significant departure in the enforcement of 18 U.S.C. § 1955.

Pet. App. 22a-23a.

ARGUMENT

1. Petitioner contends (Pet. 9-19) that Section 1955(d) does not provide for the forfeiture of real property. Section 1955(d) authorizes the forfeiture of "any property * * * used in violation" of Section 1955. "When used without qualification, the word 'property' includes both real and personal property within its sweep." *United States* v. *South Half of Lot 7 & Lot 8*, 910 F.2d 488, 489 (8th Cir. 1990) (en banc) (citing *Fidelity & Deposit Co.* v. *Arenz*, 290 U.S. 66, 68 (1933)), cert. denied, 111 S. Ct. 1389 (1991). In addition, Congress's use of the word "any" to modify "property" shows that it intended a broad construction of that term. See *United States* v. *James*, 478 U.S. 597, 605 (1986).[7]

Where, as here, the statutory language is unambiguous, "judicial inquiry is complete except in rare and exceptional circumstances." *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 604 (1991). In this case, application of the plain terms of the statute does not produce a result "demonstrably at odds with the intentions of its drafters." *Griffin* v. *Oceanic Contrac-*

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[7] Petitioner seeks to avoid the straightforward application of the statutory terms by asserting that real property, such as a building, "is not actually used 'in violation' of the provisions of § 1955(a)." Pet. 13. That effort falls short the mark where, as here, the record shows that patrons used the seized building as a gambling hall for at least several years.

Petitioner also argues (Pet. 13-14) that Congress's incorporation into Section 1955(d) of customs law procedures applicable exclusively to personal property shows that Congress did not intend to allow forfeiture of real property under Section 1955(d). That argument fails, however, because Congress has incorporated these procedures into several other forfeiture provisions that plainly apply to real property. See *United States* v. *South Half of Lot 7 & Lot 8*, 910 F.2d at 491.

tors, Inc., 458 U.S. 564, 571 (1982). There is therefore no occasion for the Court to accept petitioner's invitation (Pet. 14-15) to look beyond the plain language of Section 1955, which unambiguously authorizes forfeiture of the property at issue here.

In any event, petitioner's invitation amounts to analyzing one exchange between Senator McClellan, the Chairman of the Senate subcommittee considering the original version of Section 1955(d), and the Assistant Attorney General of the Criminal Division of the Department of Justice. Senator McClellan suggested to the Assistant Attorney General that "a forfeiture provision that would cover the equipment, adding machines, and money used in operating the illegal [gambling] establishment" would be "helpful" in achieving the purpose of the statute. See Pet. 15-16 (quoting *Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 397 (1969)). The Assistant Attorney General agreed, and the Department of Justice later proposed legislation that became Section 1955(d) This brief exchange, involving one member of Congress, scarcely shows that Congress intended to exclude real property from the reach of the statute.

Finally, both of the other courts of appeals that have considered this issue have agreed with the court below in construing Section 1955 to reach real property. See *United States* v. *South Half of Lot 7 & Lot 8, supra; United States* v. *The Premises & Real Property at 614 Portland Ave.*, 846 F.2d 166, 167 (2d Cir. 1988) (per curiam), aff'g 670 F. Supp. 475

(W.D.N.Y. 1987). Further review is therefore unwarranted.[8]

2. Petitioner also contends (Pet. 19-29) that the district court erred in denying its motion for a continuance of summary judgment proceedings under Federal Rule of Civil Procedure 56(f). Rule 56(f) allows the district court to order a continuance of summary judgment proceedings when the party opposing a motion for summary judgment "cannot for reasons stated present by affidavit facts essential to justify [its] opposition." To obtain such a continuance, a party must identify the information it needs to oppose summary judgment and explain how that information would create a genuine issue of material fact sufficient to preclude summary judgment. See *Garrett* v. *City & County of San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987); *Korf* v. *Ball State University*, 726 F.2d 1222, 1229-1330 (7th Cir. 1984); *Wilmar Poultry Co.* v. *Morton-Norwich Products, Inc.*, 520 F.2d 289, 297 (8th Cir. 1975), cert. denied, 424 U.S. 915 (1976).

In this case, the government's affidavits showed that the building had been used regularly as a gambling establishment from 1984 until its seizure in April 1988. See Pet. App. 2a-4a.[9] The government

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[8] Petitioner claims (Pet. 9-10) that review is necessary to resolve a conflict between the three courts of appeals that have held that Section 1955(d) extends to real property and two district courts that have come to the opposite conclusion. Such review would be premature until a conflict over the issue developed among the courts of appeals.

[9] In addition to Agent Whitmer's affidavit, the government submitted the affidavit of the undercover agent who visited the building and participated in illegal gambling the night before the search.

therefore established ample probable cause to believe that the building was being used in violation of Section 1955.[10] In the face of this record, petitioner claims (Pet. 24-25) that discovery might have enabled it to develop equitable reasons why the district court should not have ordered forfeiture.[11] As the court of appeals pointed out, however, "the statute authorizing mitigation petitions, 19 U.S.C. § 1618, vests exclusive jurisdiction over remission or mitigation of forfeitures * * * in the executive branch." Pet. App. 13a; see *United States* v. *One Clipper Bow Ketch Nisku*, 548 F.2d 8, 12 (1st Cir. 1977); *United States* v. *One 1958 Pontiac Coupe*, 298 F.2d 421, 423 (7th Cir. 1962). Thus, the district court could not have granted petitioner relief even if it had come forward with equitable reasons supporting a remission of forfeiture. In any event, even if the district court had the authority to decline to order the building forfeited, that decision would depend on factors external to the government's showing of probable cause, *i.e.*, the nature, history, and use of the building. Petitioner did not need discovery to develop a record regarding these factors.

Petitioner also contends (Pet. 26-27) that additional discovery would have allowed it to develop an argument that the building's forfeiture violated the Excessive Fines Clause of the Eighth Amendment. Even if petitioner were correct that the Excessive

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[10] Section 1955(b)(1) defines an illegal gambling establishment as one operating in violation of state gambling laws, employing five or more persons, and continuing over 30 days. See Pet. App. 2a-3a.

[11] Petitioner did not raise this contention before the district court—a procedural default recognized by the court of appeals. See Pet. App. 13a.

Fines Clause applies to civil in rem forfeitures, but see Pet. App. 14a (citing cases), it is difficult to see how additional discovery would have allowed petitioner to develop this claim. Nor does petitioner explain what information it could have obtained through discovery that would have been relevant to this claim. Such a speculative claim does not warrant a continuance under Rule 56(f).

Lastly, petitioner argues (Pet. 27-29) that discovery would have allowed it to develop a defense on the merits of the forfeiture action. In particular, petitioner claims that depositions of the government's affiants would have uncovered facts that would have created a material issue of fact regarding whether an "illegal gambling operation" within the meaning of Section 1955 was being held in the building. According to petitioner, "[t]here are always questions about ability to observe and inferences drawn from observations which should be tested in some manner before summary judgment is granted." Pet. 28.

Rule 56(f), as the courts below recognized, does not provide a vehicle for a party opposing summary judgment to engage in a fishing expedition in the hope that some evidence adverse to the moving party will emerge. Petitioner has pointed to no substantive evidence that it seeks to obtain that would controvert the government's showing of probable cause to believe that the building was being used in violation of Section 1955. Petitioner merely seeks to depose the government's affiants with the wish that they will contradict their affidavits or otherwise provide information adverse to the government. The government's evidentiary submissions, however, detailed the gambling activities at the building. In fact, petitioner has abandoned its challenge to the government's probable

cause showing. See note 5, *supra*. In these circumstances, the district court exercised sound discretion in rejecting petitioner's request for a continuance under Rule 56(f).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1991

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 88 C 5205

UNITED STATES OF AMERICA, PLAINTIFF

v.

ON LEONG CHINESE MERCHANTS
ASSOCIATION BUILDING, ET AL., DEFENDANTS

[Filed Oct. 13, 1989]

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

In this action, the government seeks the forfeiture of the On Leong Chinese Merchants Association Building (the "Building"), cash, and various other items allegedly used in violation of 18 U.S.C. § 1955. The government moved for summary judgment on September 22, 1988. The claimant then moved for a continuance of summary judgment proceedings pursuant to Fed.R.Civ.P. 56(f). The government agreed to such a continuance with respect to all of the defendant properties with the exception of the Build-

ing. On May 9, 1989, the Court determined that summary judgment proceedings should proceed with respect to the Building, and it set a briefing schedule. Pending, then, is the motion for summary judgment with respect to the Building.

Claimants first argue that the Building is not subject to forfeiture under § 1955 because, although the statute provides that "any property" may be seized, it does not specifically provide for the forfeiture of real property. The majority of the courts which have considered whether real property is forfeitable under § 1955 have answered that question in the affirmative. *See United States v. Premises and Real Property at 614 Portland Ave.*, 846 F.2d 166, 167 (2d Cir. 1988), *aff'g per curiam*, 670 F.Supp. 475 (W.D.N.Y. 1987); *United States v. Various Denominations of Currency and Coin Totalling $4280.45*, 628 F.Supp. 4 (S.D.W. Va. 1984); *United States v. Bonanno Organized Crime Family*, 683 F.Supp. 1411, 1458-60 (E.D.N.Y. 1988), *aff'd on other grounds*, 879 F.2d 20 (2d Cir. 1989). *But see United States v. Building & Property known as 123-125 East Twelfth St.*, 527 F.Supp. 1167 (W.D. Pa. 1981) (real property not subject to forfeiture); *DiGiacomo v. United States*, 346 F. Supp. 1009 (D. Del. 1972) (same). The claimants cite only *United States v. South Half of Lot 7 and Lot 8*, 876 F.2d 1362 (8th Cir. 1989), which held that real property is not subject to forfeiture. However, after the motion for summary judgment was fully briefed, the Eighth Circuit vacated that order pending rehearing en banc. *United States v. Unit No. 7 and Unit No. 8 of Shop*, 883 F.2d 53 (8th Cir. 1989). This Court agrees with the majority view and holds that real property is forfeitable under § 1955.

The claimants next argue that the government has not established probable cause in this case. The claimants focus on § 1955(b)(1)(iii), which requires, for purposes of this case, that the business have a gross revenue of $2000 in a single day.[1] The claimants argue that the affidavits submitted by the government do not establish probable cause to believe that $2000 in gross revenue was received in a single day. Initially, the Court notes that gross revenue, for purposes of § 1955, is defined as the total amount of money wagered rather than net profit. *See United States v. Zemek*, 634 F.2d 1159, 1177 (9th Cir. 1980), *cert. denied*, 450 U.S. 916, 101 S.Ct. 1359 (1981); *United States v. Rotchford*, 575 F.2d 166, 174 (8th Cir. 1978). In this case, FBI Special Agent George Ng states in his affidavit that he witnessed six bettors at one table placing wagers of as much as $3000 to $4000, and 25 to 30 bettors at another table placing wagers of as much as $1500 to $2000. The claimants have submitted no evidence which would tend to show that the $2000 gross revenue requirement has not been met.[2] Agent Ng's uncontroverted

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[1] Section 1955(b)(1) provides:

> "[I]llegal gambling business" means a gambling business which—
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

[2] The claimants argue that the pendency of a criminal investigation has interfered with their ability to present evidence. This argument was rejected in the Court's minute order of

affidavit clearly establishes probable cause to believe that the gross revenue requirement was established.

The Court finds that the government has established probable cause to believe that the defendant Building is subject to forfeiture. The government's motion for summary judgment with respect to the Building is therefore granted.

ENTER:

/s/ Ilana Diamond Rovner

ILANA DIAMOND ROVNER
United States District Judge

Dated: October 13, 1989

May 9, 1989, and the Court does not find that the claimed inability to present evidence, in the circumstances of this case, precludes entry of summary judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 88 C 5205

UNITED STATES

v.

ON LEONG CHINESE ASSOCIATION
BUILDING, ET AL.

[Filed May 9, 1989]

ORDER

This is a civil forfeiture action involving the On Leong Chinese Merchants Association Building (the "Building"), cash, and various other items allegedly used in violation of U.S.C. § 1955, which prohibits illegal gambling businesses. The government moved for summary judgment on September 27, 1988. That motion has not been fully briefed. Rather than filing a response, claimant moved for a continuance of summary judgment proceedings pursuant to Fed. R. Civ. P. 56(f). The government agreed to such a continu-

ance with respect to all of the defendant properties with the exception of the Building.

With respect to the Building, the government argued that a continuance was not warranted, relying on *DF Activities Corp. v. Brown*, 851 F.2d 920 (7th Cir. 1988). In that case, the defendant in a contract dispute moved for dismissal on the basis of a statute of frauds defense, and submitted an affidavit denying that she had entered into the alleged contract. The plaintiff argued that it should have an opportunity to engage in discovery. The court of appeals, affirming the district court, held that dismissal was proper and that there was no point in keeping the lawsuit alive in light of the unlikelihood that the defendant would testify in a deposition contrary to the statements in her affidavit. 851 F.2d at 922. Judge Flaum, in dissent, agreed that the district courts have broad discretion to determine the limits of permissible discovery, but argued that the dismissal should have been vacated because the affidavit did not contain a blanket denial that any agreement was reached. 851 F.2d at 925. Thus deposing defendant "would not necessarily be a futile effort." *Id.*

Claimant argues that *DF Activities* is inapplicable here because claimant wishes "to depose the government's affiants, not in order to trick them into reversing their positions, but to ascertain the basis, scope, and accuracy of their observations." (Amended Mem. in Support of Claimant's Rule 56(f) Motion at 5 n.2.) The Court disagrees, and finds that the circumstances here support proceeding with the summary judgment motion even more so than in *DF Activities*. In contrast to the evasive affidavit at issue in *DF Activities*, the affidavits presented by the government in this case are replete with detail concerning the circumstances which the government ar-

gues constitute probable cause. Claimant has identified no specific testimony that it hopes to gain from deposing the affiants; it rests on general arguments that it may be able to establish information concerning the "basis, scope and accuracy of their observations" which would make the affidavits less credible. In light of the detail already presented in the affidavits, depositions with those goals would be at least as futile as the deposition of the defendant in *DF Activities*.

Claimant also argues that the stay of discovery prevents it from obtaining affidavits from the persons within its own control, because those persons may be at risk in the criminal prosecution. This is an argument entirely unrelated to the stay of discovery itself. Claimant essentially argues that it possesses the relevant information but is unwilling or unable to submit it. The Court does not find this to be a valid basis for interrupting the civil action.

Accordingly, the Court will proceed with the government's motion for summary judgment. Claimant's response to the motion is due June 6, 1989. The government's reply is due July 7, 1989.

/s/ Ilana D. Rovner

ILANA D. ROVNER

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